(18)

No. 91-471

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

CHEMICAL WASTE MANAGEMENT, INC.,
Petitioner,

v.

GUY HUNT, GOVERNOR OF THE STATE OF ALABAMA;
ALABAMA DEPARTMENT OF REVENUE; and
JAMES M. SIZEMORE, JR., COMMISSIONER OF THE
ALABAMA DEPARTMENT OF REVENUE,
Respondents.

On Writ of Certiorari to the Supreme Court of Alabama

BRIEF OF THE STATES OF SOUTH CAROLINA, KANSAS, LOUISIANA, AND UTAH AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether the excessive environmental burdens and costs attributable to disposal at landfills within Alabama of large quantities of hazardous waste generated outside Alabama, exacerbated by EPA's failure to provide for installation of new capacity for hazardous waste disposal in landfills, support higher fees for the disposal of that waste within the State.

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Pursuant to this Court's Rule 37.5, the States of South Carolina, Kansas, Louisiana, and Utah respectfully submit this brief as *Amici Curiae* in support of Respondents Guy Hunt, Governor of the State of Alabama, the Alabama Department of Revenue ("ADR"), and James Sizemore, Jr., Commissioner of ADR.

INTEREST OF THE STATES OF SOUTH CAROLINA, KANSAS, LOUISIANA, AND UTAH

The States of South Carolina, Kansas, Louisiana, and Utah, like Alabama, are authorized by the U.S. Environmental Protection Agency ("EPA") to operate hazardous waste management programs "in lieu of" the fed-

eral program, pursuant to Section 3006(b) of the Resource Conservation and Recovery Act of 1976, as amended ("RCRA"), 42 U.S.C. § 6926(b), Appendix *infra*, at 1a. In granting its authorization for South Carolina's program, EPA specifically authorized South Carolina to levy a higher fee for disposal of out-of-state hazardous waste than for waste generated in-state. 50 *Fed. Reg.* 46,437 (Nov. 8, 1985), Appendix *infra*, at 4a. EPA authorized South Carolina's program in the face of a challenge to the differential fee brought by the Hazardous Waste Treatment Council ("HWTC") on federal statutory and Commerce Clause grounds.[1] HWTC raised its claims in the authorization proceedings before EPA; to be approvable, state programs must be "consistent" with federal law and regulations. RCRA § 3006(b), 42 U.S.C. § 6926(b), Appendix *infra*, at 1a; 40 C.F.R. §§ 271.4(a), Appendix *infra*, at 2a-3a, and 271.22-.23. South Carolina thus has an interest in the propriety of Alabama's fees, although the South Carolina provision stands on a different legal and factual footing because it is an EPA-approved component, federally-enforceable, of the State's hazardous waste management program operating "in lieu of" the federal RCRA program. RCRA 3006, 42 U.S.C. § 6926, Appendix *infra*, at 1a.[2]

Alabama and South Carolina also have a community of interest as signatory states to the SARA Capacity Assurance Regional Agreement, entered in October 1989.[3]

[1] In the present case, HWTC and National Solid Wastes Management Association filed a brief *Amici Curiae* in support of Petitioner Chemical Waste Management, Inc. ("CWM") on March 12, 1992. A division of CWM, Trade Waste Incineration, is a member of HWTC.

[2] EPA also has approved hazardous waste management programs with differential fees in Ohio and Maine. *See* 54 *Fed. Reg.* 27,170 (June 28, 1989) (Ohio); 53 *Fed. Reg.* 16,264 (May 6, 1988) (Maine).

[3] Tennessee and Kentucky are also signatories. North Carolina joined the Regional Agreement in November 1989, but it was later

The purpose of the regional agreement is "to provide the framework for a regional approach for the long-term management of hazardous waste." Regional Agreement, second paragraph of recitals. The Regional Agreement is expressly contemplated and encouraged by federal law —Section 104(c)(9) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended ("CERCLA"), 42 U.S.C. § 9604(c)(9).[4]

Moreover, South Carolina, like Alabama, is one of the few states to have a RCRA-permitted commercial hazardous waste landfill in operation.[5] Only one new commercial hazardous waste landfill disposal facility has been permitted and has begun operation *anywhere* in the nation in the years since RCRA took effect.[6] South Carolina, like Alabama, had a pre-RCRA facility in place that acquired "interim status" and then a RCRA permit as

automatically eliminated from the Agreement when it failed to site and permit new treatment and disposal capacity for hazardous wastes by dates specified in an addendum to the Agreement. *See Hazardous Waste Treatment Council v. South Carolina*, 945 F.2d 781, 786 n.8 (4th Cir. 1991).

[4] *See infra*, p. 8 & n.10. CERCLA established the "Superfund" program to provide for remedies to be applied at facilities and properties that have been contaminated with hazardous substances and are the site of a release or threat of release of such substances. *See* 42 U.S.C. §§ 9601-9675.

[5] Besides landfills, "land disposal" by statutory definition includes placement of hazardous waste in a "surface impoundment, waste pile, injection well, land treatment facility, salt dome formation, salt bed formation, or underground mine or cave." RCRA § 3004(k), 42 U.S.C. § 6924(k). *See* Brief for the United States as *Amicus Curiae*, at 6 n.8.

[6] In the instant case, the trial court found that only one new landfill facility, to be located at Last Chance, Colorado, had been permitted since the effective date of RCRA in 1980 and that facility had never operated or accepted waste. J.A. 57a (¶ 4). However, that one facility finally was completed and began operation in the second half of 1991. *See* Chemical Marketing Reporter, November 18, 1991, at SR 12; USA Today, July 22, 1991, at 6A.

an existing facility. *See* RCRA § 3005(e), 42 U.S.C. § 6925(e). Because only one new commercial hazardous waste landfill has been permitted and begun operation, the few existing facilities that have remained in operation have been subjected to insupportable burdens. The states where these few facilities are located, including Alabama and South Carolina, have been forced to bear burdens that are vastly disproportionate to their needs, and to shoulder costs and detriments that other states, the great majority, have not had to carry.

Given these circumstances, South Carolina, Kansas, Louisiana, and Utah are in a position to provide a perspective which may assist the Court in evaluating the viability of differential fees for landfilling hazardous waste. Correspondingly, the States would benefit from a decision by this Court respecting the ability and power of states to tax and regulate disposal of hazardous waste under the legislative structure enacted by Congress and its regulatory implementation by EPA. *See Hazardous Waste Treatment Council v. South Carolina*, 945 F.2d 781, 785 n.2 (4th Cir. 1991).

ADDITIONAL STATUTES AND REGULATORY PROVISIONS INVOLVED

Pertinent portions of RCRA §§ 3006 and 3009, 42 U.S.C. §§ 6926 and 6929, governing authorized state hazardous waste regulatory programs, are set out in an Appendix to this brief, along with one of EPA's implementing regulations, 40 C.F.R. § 271.4. Also set out in the Appendix is 50 *Fed. Reg.* 46,437-440 (Nov. 8, 1985), the decision by EPA applying 40 C.F.R. § 271.4(a) in approving the South Carolina hazardous waste management program in which EPA addressed and expressly approved the provision imposing higher fees for the disposal within South Carolina of hazardous wastes generated outside the State.

SUPPLEMENTAL STATEMENT OF THE CASE

RCRA § 3006(b) provides that a state may be authorized to "administer and enforce a hazardous waste program" upon authorization from EPA. 42 U.S.C. § 6926(b), Appendix *infra*, at 1a. EPA *must* authorize the state program unless the Agency finds that it "is not equivalent to the Federal program," "is not consistent with the Federal or State programs applicable in other States," or "does not provide adequate enforcement of compliance with the requirements of [Sections 3001-3020 of RCRA]." *Id.* RCRA § 3009 empowers states to promulgate hazardous waste laws and regulations "which are more stringent than those imposed by [RCRA]," and it insulates state authority to regulate hazardous wastes from preemption by federal regulatory requirements, so long as the state provisions are not "less stringent than those authorized under [RCRA §§ 3001-3020] respecting the same matter." 42 U.S.C. § 6929, Appendix *infra*, at 2a.

Once a state program is authorized by EPA, the state is required "to carry out such program in lieu of the Federal program." 42 U.S.C. § 6926(b), Appendix *infra*, at 1a. Action taken by a state pursuant to its authorized hazardous waste program carries "the same force and effect as action taken by [EPA] under [RCRA]." *Id.* § 6926(d). A state's authorization continues until EPA determines after a public hearing (initiated on its own or by citizen petition) that the state program no longer conforms to federal requirements. 42 U.S.C. § 6926(e); 40 C.F.R. §§ 271.22-.23. *See Hazardous Waste Treatment Council v. Reilly*, 938 F.2d 1390 (D.C. Cir. 1991). "[A]ny interested person" may seek judicial review in a U.S. Court of Appeals of EPA's grant, denial, or withdrawal of state authorization to operate a hazardous waste program in lieu of the Federal program. RCRA

§ 7006(b), 42 U.S.C. § 6976(b). Absent a timely petition, review is barred.[7]

In implementing RCRA §§ 3006 and 3009, EPA's regulations explicitly address the necessary and thus permissible effects on interstate commerce of an authorized state program.[8] In particular, 40 C.F.R. § 271.4(a) establishes standards to evaluate whether a state program is "consistent" with federal law within the meaning of RCRA § 3006(b), and one facet of the "consistency" requirement is that a state program may not affect interstate commerce in an "unreasonabl[e]" manner:

> Any aspect of the State program which unreasonably restricts, impedes, or operates as a ban on the free movement across the State border of hazardous wastes from or to other States for treatment, storage, or disposal at facilities authorized to operate under the Federal or an approved State program shall be deemed inconsistent.

Id., Appendix *infra*, at 3a. EPA adopted this "reasonableness" test in Section 271.4(a) to adjudge the interstate commerce effects of an authorized state program. In doing so, the Agency gave explicit, detailed consideration to the statutory framework and the provisions of RCRA §§ 3006 and 3009 and this Court's interpretations of the "dormant" Commerce Clause. *See* 45 *Fed. Reg.* 33,290, 33,395 (May 19, 1980).[9]

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[7] Thus, review of EPA's action in 1985 in approving South Carolina's program, including South Carolina's differential fee, is no longer available.

[8] Some aspects of RCRA require reference to the state of origin of hazardous waste; *e.g.*, operation of the "manifest" system, which for safety reasons tracks the transportation of hazardous waste, 40 C.F.R. Part 262, Subpart B. The federal framework must also accommodate "more stringent" treatment, storage and disposal standards implemented by states under Section 3009 of RCRA, 42 U.S.C. § 6929, Appendix *infra*, at 2a.

[9] EPA followed *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978), and deemed any "*ban* on the interstate movement of hazardous waste" as "automatically inconsistent." 45 *Fed. Reg.* 33,290, 33,395 (May 19, 1980) (emphasis added). At the same time, EPA did not indicate whether its regulatory language, "unreasonabl[e] restrict[ion] or imped[iment]," would or could be construed to adopt the *City of Philadelphia* test. The evident difference between the language chosen by EPA for the regulation and the explication of the test set out in *City of Philadelphia* indicates that the regulatory criterion was intended by EPA to be interpreted differently from the *City of Philadelphia* test.

Thereafter, when in 1985 HWTC raised a Commerce Clause challenge to approval of South Carolina's hazardous waste program, EPA applied the "reasonableness" test of 40 C.F.R. § 271.4(a) to South Carolina's differential fee on hazardous waste disposal. EPA determined that the "unreasonably restricts [or] impedes" phrase in Section 271.4(a) created a "facts and circumstances test." 50 *Fed. Reg.* 46,437, 46,440 (Nov. 8, 1985), Appendix *infra*, at 13a. EPA resolved to "look to all relevant factors" in evaluating a restriction or impediment on the movement of hazardous waste into a state. *Id.* at 46,439, Appendix *infra*, at 11a. The Agency considered the applicability of this Court's decision in *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978), but concluded that the "Agency is not required to adopt the Constitutional test for impediments or restrictions in interpreting its own regulations, and declines to do so here." 50 *Fed. Reg.* at 46,439, Appendix *infra*, at 11a. Moreover, EPA rejected the contention "that *any* disparity in treatment between in-State and out-of-State waste is *per se* unreasonable." *Id.* After reviewing "[a]ll available evidence," *id.*, Appendix *infra*, at 12a, EPA sustained the South Carolina differential fee.

EPA's process and procedures under its RCRA regulations for review, approval, and withdrawal of state hazardous waste regulatory programs thus are used to address unreasonable restrictions on interstate waste movements. However, another regulatory program administered by EPA also has a direct bearing on permissi-

ble state programs. The complementary program is that arising under Section 104(c)(9) of CERCLA, 42 U.S.C. § 9604(c)(9). This program requires states to provide assurance that they "have adequate capacity for the destruction, treatment, or secure disposition of all hazardous wastes that are reasonably expected to be generated within the State during the [next] 20-year period." *Id.* If a state does not provide the requisite assurance, the sanction specified in CERCLA § 104(c)(9) is that "the President shall not provide any remedial actions pursuant to this section" within the state. In other words, federal "Superfund" money for remedial actions within the offending state shall be cut off.[10] As a matter of policy, EPA's Administrator has directed that procedures under RCRA for withdrawing authorization of a state's hazardous waste regulatory program should be pursued only "after determining that the CERCLA process has proven ineffective." Memorandum from Lee M. Thomas to Regional Administrators, "Policy Regarding Hazardous Waste Management Capacity and RCRA Consistency Issues" (Dec. 23, 1988), Appendix *infra*, at 18a. "The CERCLA capacity assurance process should be used as an initial response to State actions which prohibit waste management within State boundaries without environmental justification." *Id.*

The capacity-assurance provision of CERCLA was adopted because EPA and states had failed to permit new

[10] CERCLA § 104(c)(9) was added by Section 104(k) of the Superfund Amendments and Reauthorization Act of 1986 ("SARA"), Pub. L. No. 99-499, 100 Stat. 1613 (Oct. 17, 1986) (amending scattered sections of CERCLA). The facilities relied upon to make the capacity-assurance showing must be "within the State or outside the State in accordance with an interstate agreement or regional agreement or authority." CERCLA § 104(c)(9)(B), 42 U.S.C. § 9604(c)(9)(B).

South Carolina and other states in the Southeastern Region have entered into a SARA Capacity Assurance Regional Agreement, *see supra*, pp. 2-3 & n.3, to coordinate efforts in assuring the requisite capacity for disposing of hazardous wastes.

commercial hazardous waste disposal facilities following implementation of RCRA. This failure had caused the few states with pre-RCRA facilities (including Alabama and South Carolina) to bear a vastly disproportionate share of the Nation's hazardous waste burden.[11] In re-

[11] The burden extends well beyond the commitment of land resources for hazardous waste landfills and other disposal or treatment facilities. (Land used as a hazardous waste landfill ordinarily is prevented from being used in the future for a full range of purposes.) The risk of releases from landfills is very real, notwithstanding the existence of regulatory standards and requirements for their design and operation. Landfilling as a disposal method is disfavored precisely because it cannot assure long-term containment. *See* RCRA § 1002(b)(7) and (8), 42 U.S.C. § 6901(b)(7) and (8), quoted *infra*, pp. 17-18 n.18; Brief for the Respondents, p. 5, quoting General Accounting Office, *Hazardous Waste, Funding Of Post-closure Liabilities Remains Uncertain* (June 1990), J.A. 84. And, permitted facilities have been known not to comply with permit conditions and terms. For example, in South Carolina, the one hazardous waste landfill is located near Pinewood in Sumter County. That facility operates under "interim status"; its issued permit has been appealed and is not yet effective. *See infra*, p. 16 n.16. Since 1985, when EPA approved South Carolina's hazardous waste management program, the State has issued eight separate enforcement orders respecting the Pinewood landfill, as follows: *In Re: GSX Services of South Carolina, Inc.*, Administrative Consent Order No. 86-37-SW (July 1, 1986) (expanded groundwater assessment program to assess contaminants identified in groundwater); Administrative Consent Order No. 86-47-SW (Sept. 5, 1986) (civil penalty of $1,500 and schedule for submission of information necessary for permit application); Amendment to Administrative Consent Order No. 86-37-SW (June 29, 1987) (additional sampling activities and initial corrective action); Administrative Consent Order No. 88-03-SW (Jan. 27, 1988) (civil penalty of $1,000 and schedule for submission of information necessary for permit application); Administrative Consent Order No. 89-15-SW (June 15, 1989) (civil penalty of $4,000 and specifications for sampling and analysis plan); Administrative Consent Order No. 90-80-SW (Nov. 26, 1990) (civil penalty of $1,100 and specifications concerning satellite container waste and spill clean-up waste); Administrative Order No. 91-44-SW (July 11, 1991 (civil penalty of $64,590 and requirements related to leaks in tanks and failure promptly to remove liquid in secondary contain-

porting the legislation that became SARA, the Senate Committee on Environment and Public Works stated that:

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ment system); Administrative Consent Order No. 91-66-SW (Nov. 13, 1991) (civil penalty of $135,000, requirements for timely removal of material in secondary containment system, repair of berms for landfill cells, and repair of liners to cells).

Moreover, transportation of hazardous wastes has proven to be troublesome. For example, on July 23, 1991, a truck carrying toxic wastes on I-95 just south of Washington, D.C. caught fire by spontaneous combustion of the wastes. *See Heat Ignites Truck's Toxic Waste Paralyzing I-95 in Va.*, Washington Post, July 24, 1991, at A1. The truck burned for several hours before firefighters approached the vehicle because they feared that barrels in the truck could explode. *Id.* Press reports stated that "the road situation became increasingly desperate":

> Fire officials blocked off all lanes on I-95 . . . .
>
> Some cars were diverted to Route 1, the only other major north-south road in the area. Then, from 1 to 2 p.m., Route 1 was also closed when some motorists there complained of burning eyes . . . .
>
> The congestion spread throughout the two-lane rural roads that service the area.
>
> . . .
>
> Virginia State Police Sgt. Dean Jones said motorists in 18 cars and passengers in three buses were escorted off the highway because of health problems, including one man who suffered a heart attack near the Beltway and I-95. Fairfax Fire Department spokeswoman Pam Weiger said her agency treated six people on the highway for heat exhaustion and evacuated three others to area hospitals.

Id. at A6.

Other accidents involving trucks carrying hazardous wastes have created similar harms and inconvenience to motorists and nearby residents. *See Crash on I-270 Forces Evacuations in Rockville; Officials Fear Leak of Explosive Cargo*, Washington Post, Dec. 15, 1989, at A1 ("tractor-trailer carrying 14 tons of hazardous chemicals . . . overturned on Interstate 270 in Rockville at rush hour last night, forcing the evacuation of at least 100 houses near the highway").

The record in the instant case includes evidence of accidents involving trucks carrying hazardous waste to the Emelle facility. J.A. 38-39.

> Superfund money should not be spent in States that are taking insufficient steps to avoid the creation of future Superfund sites. . . .
>
> . . .
>
> While everyone wants hazardous waste managed safely, hardly anyone wishes it managed near them. This is the NIMBY syndrone (not in my backyard). Yet, if the RCRA and Superfund programs are to work—if public health and the environment are to be protected—the necessary sites must be made available.

S. Rep. No. 11, 99th Cong., 1st Sess., 22-23 (1985). *See also* 132 Cong. Rec. S14,924-25 (Oct. 3, 1986) (statement of Sen. Chafee); 131 Cong. Rec. S11,584-85 (Sept. 17, 1985) (statement of Sen. Chafee); H. Rep. No. 253 (I), 99th Cong., 1st Sess., at 130-31 (1985), *reprinted in* 1986 U.S. Code Cong. & Admin. News 2835, 2912-13. Congress' goals in adopting CERCLA § 104(c)(9) were summarized as: "obtaining an [sic] good national picture of hazardous waste management, ensuring that states would develop the capacity needed to manage future waste, and discouraging states from relying on out-of-state disposal capacity in lieu of solving local siting barriers." [12] By requiring each state to account for its own hazardous waste and to provide for its disposition within its borders, Congress intended that new disposal capacity would be created, and it understood that states would also distinguish (as Congress had) between hazardous waste generated in-state and that generated out-of-state.

The CERCLA capacity-assurance provision has not had the desired effect. Since its enactment, and indeed for more than the past decade, only one new commercial hazardous waste landfill has been permitted under RCRA

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[12] National Governors' Association, Natural Resources Policy Studies, Center for Policy Research, *Hazardous Waste Management In The States: A Review Of The Capacity Assurance Process*, at 20 (March 1992 draft) [hereafter *"NGA Capacity Assurance Study"*].

and become operational anywhere in the Nation. *See supra*, p. 3 & n. 6. Nothing has been accomplished as a result of the federal regime in RCRA and CERCLA to produce the desired proportionality of burden.[13] Moreover, EPA has not acted under either the CERCLA capacity-assurance provision or under RCRA's consistency provision to apply sanctions to states that have refused to create new disposal capacity by siting new facilities. EPA's default has reinforced other states' reliance on the few existing facilities in states like Alabama and South Carolina. *See, e.g., Hazardous Waste Treatment Council v. Reilly*, 938 F.2d 1390 (D.C. Cir. 1991); *South Carolina ex rel. Medlock v. Reilly*, No. 91-3090 NHJ (D.D.C. filed Dec. 2, 1991); *New York v. Reilly*, No. 91-CV-1418 (N.D.N.Y. filed Dec. 16, 1991).

[13] The *NGA Capacity Assurance Study* compiled data on net imports and exports of hazardous waste in 1987, based on state capacity assurance plans submitted in 1989. The Study reported that 35 states were net exporters of hazardous waste and that

> the top five waste exporting states are Pennsylvania (158,677 tons), California (119,978 tons), Washington (108,491 tons), Michigan (76,295 tons), and Massachusetts (71,109 tons). In general, the amount of net waste exports are rather small compared to the total amount of waste generated by each state. Of the top five exporters, only Washington and Massachusetts had export figures that exceeded 30 percent of their generation (these states exported the equivalent of 33 and 46 percent, respectively of their generated waste . . . .
>
> In contrast, the net waste importers tend to report net transactions on a more significant scale. The top five net importing states are Indiana (251,478 tons), Louisiana (230,300 tons), Alabama (199,859 tons), Ohio (183,005 tons), and South Carolina (108,985 tons). It is interesting to note that the top net importing states receive almost twice as much waste as that which leaves the top five exporting states.

NGA Capacity Assurance Study, supra n.10, at 13-14.

In the ensuing several years, waste minimization efforts may have modestly reduced the overall quantity of hazardous wastes shipped but the proportions sent to and from the several states, especially to landfills, have remained relatively constant because new hazardous waste landfill capacity has not been added. *See* Brief for the Respondents, p. 2 & n.1.

On December 8, 1987, Alabama's hazardous waste program was approved under RCRA to operate in lieu of the federal program. Following Alabama's adoption of the differential fee at issue in this case, neither EPA nor CWM invoked RCRA's regulatory process to challenge the fee as being an unreasonable impediment to interstate commerce and therefore inconsistent with and violative of RCRA within the meaning of 40 C.F.R. § 271.4 (a). Instead, CWM brought suit in state court to contest the constitutionality of the provision. On appeal from a decision after a four-day non-jury trial, the Alabama Supreme Court held that Alabama had advanced sufficient justification for its laws to withstand the elevated-scrutiny test set out in *Maine v. Taylor*, 477 U.S. 131 (1986). This Court granted certiorari to address the permissibility of the differential fee under the Commerce Clause.[14]

SUMMARY OF ARGUMENT

Alabama's differential fee for disposal at permitted landfills within the State of hazardous waste generated outside the State serves Alabama's legitimate purposes that could not be served by alternatives. The landfill disposal within Alabama of large amounts of hazardous wastes generated elsewhere, and the associated transportation of such wastes, imposes excessive environmental burdens and costs on the State and its citizenry. These

[14] Petitioner CWM unsuccessfully challenged other aspects of Ala. Act No. 90-326 (codified at Ala. Code §§ 22-30B-1.1 *et seq.*) under the Commerce Clause. Act No. 90-326 also imposed a base disposal fee of $25.60 per ton on all hazardous waste disposed of at Alabama's commercial disposal facilities and placed a statutory cap on the amount of hazardous waste that could be disposed of at such facilities over a one-year period. The trial court ruled that the base fee and statutory cap did not violate the Commerce Clause, and that decision was upheld by the Alabama Supreme Court. *See Hunt v. Chemical Waste Management, Inc.*, 584 So.2d 1367 (1991), Appendix to Petition, p. 1a.

burdens and costs are in part offset by the differential fee.

The cause of the excessive landfill waste disposal burden and costs placed on Alabama is readily discernable. Since enactment of RCRA, there has been a general nationwide failure to site new commercial landfill capacity for disposal of hazardous waste. The paucity of new or additional capacity in large part stems from EPA's failure to implement its pertinent authority under RCRA and CERCLA and from many states' purposeful efforts to saddle neighboring states with their hazardous waste disposal. The resulting scarcity has placed insupportable burdens on states like Alabama and South Carolina which have the few permitted landfill facilities. The Alabama Supreme Court was correct to determine that, even when subjected to elevated scrutiny under the "dormant" Commerce Clause, Alabama's justifications based upon health, safety, and welfare provide ample support for its hazardous waste laws and, specifically, for the state's differential fee on hazardous waste disposal.

This case turns on the detailed framework in RCRA for adoption and approval of state hazardous waste regulatory programs, including differential fees, approval by EPA of those programs, and implementation of them "in lieu" of the federal program once EPA has given its approval. This RCRA framework, taken with the complementary capacity-assurance provisions in CERCLA § 104 (c) (9), 42 U.S.C. § 9604 (c) (9), displaces dormant Commerce Clause principles. EPA has adopted a regulatory test, set out at 40 C.F.R. § 271.4, which makes "inconsistent," and thus not approvable, a state "program which unreasonably restricts, impedes, or operates as a ban on the free movement . . . of hazardous wastes." Appendix *infra*, at 3a. Because the Alabama fee differential is reasonable in the circumstances, it should be sustained upon application of that test, whether by EPA or a court.

ARGUMENT

THE ALABAMA SUPREME COURT CORRECTLY ACCORDED SIGNIFICANT WEIGHT TO ALABAMA'S LEGITIMATE PUBLIC PURPOSES IN ADDRESSING THE DISPOSAL OF HAZARDOUS WASTE WITHIN ITS BORDERS

A. The Federal Regulatory Program Has Failed To Relieve States Like Alabama And South Carolina Of An Insupportable Burden Placed On Them By The Numerous States Which Have Failed To Site Any Landfill Facilities For Hazardous Wastes

A major challenge in dealing with hazardous wastes today, according to the National Governors' Association's current study, is to

> create incentives that discourage the generation of hazardous wastes, encourage the development of in-state or regional management capacity, and compensate importing states for the significant costs, risks, and other burdens they bear as hosts to hazardous waste management facilities used by other states.

NGA Capacity Assurance Study, *supra* n.10, at D-1 (Excerpt from NGA Policy Position on Hazardous Waste Management, as of March 22, 1992). For Alabama and South Carolina, the legislative efforts to address this challenge — embodied in RCRA and CERCLA — have failed. The federal RCRA and CERCLA programs have had the ironic and unintended consequence of forcing a few states with operable hazardous waste landfill facilities to make up for the failure of other states to permit disposal within their borders.[15] Alabama and South Car-

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[15] The article of commerce at issue in this case is not the hazardous waste itself, which by definition has no value or more probably a negative value. *See* RCRA § 1004 (27), 42 U.S.C. § 6903 (27), defining "solid waste," of which hazardous waste is a subset, to mean "*any garbage, refuse*, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility *and other discarded material* . . . ." (Emphasis added.) *See also* 40 C.F.R. § 261.2 (definition of "solid waste" in EPA's regulations). In

olina, which had hazardous waste landfill disposal facilities in place before the advent of RCRA, have suffered the brunt of other states' lack of political resolve to site new landfill disposal capacity. *See* S. Rep. No. 11, 99th Cong., 1st Sess., at 22-23 (1985) (quoted *supra*, p. 11). The few states with existing hazardous waste landfill disposal capacity thus have shouldered a wholly disproportionate share of the hazardous waste disposal burden.[16] Rather than promoting the development of a unified, coherent, nationwide response to this country's hazardous waste disposal problem, the federal regime instead has institutionalized the NIMBY (not in my backyard) syndrome and penalized those states with existing facilities. Under these circumstances, Alabama was justified in modifying its federally-authorized program to regulate more stringently the in-state disposal of hazardous waste

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American Mining Congress v. EPA, 824 F.2d 1177 (D.C. Cir. 1987), the court of appeals ruled that EPA's definition of solid waste contravened the statutory definition insofar as "in-process secondary materials" were concerned. *Id.* at 1192-93. As the court put it, Congress intended that " 'solid waste' (and therefore EPA's regulatory authority) be limited to materials that are 'discarded' by virtue of being disposed of, abandoned, or thrown away." *Id.* at 1193 (footnote omitted).

The item traded in commerce actually is the landfill disposal capacity for hazardous wastes. Landfill capacity does not move in interstate transactions, but commercial transactions attend the interstate movement of hazardous wastes for ultimate landfill disposal.

[16] Before 1980, the treatment, storage, and disposal of hazardous waste was largely unregulated. Disposal facilities in place before 1980, when RCRA regulations first took effect, were allowed to operate under "interim status" until a final RCRA permit was obtained under the federal rules or their state analog. RCRA § 3005(e), 42 U.S.C. § 6925(e); *see* 40 C.F.R. Part 265 (EPA regulations governing "interim status" facilities). As noted by EPA, pre-RCRA facilities "are allowed to operate under certain less stringent conditions and regulations on an interim basis until final permit determinations are made." EPA Office of Solid Waste & Emergency Response, The Nation's Hazardous Waste Management Program at a Crossroads—The RCRA Implementation Study, at 41 (July 1990).

and thereby better protect the safety, health, and welfare of its residents and the state's environment.

The current study of state hazardous waste import-export activity performed by the National Governors' Association ("NGA") illuminates the severe imbalance among states.[17] The NGA study shows that Alabama is one of the largest net importers of hazardous waste in the entire nation, annually taking nearly half a *billion* pounds of hazardous waste per year from other states. *NGA Capacity Assurance Study*, *supra* n.10, at 14. Also on a net basis, Louisiana annually receives a comparable amount of hazardous waste. *Id.* Similarly, South Carolina holds the dubious distinction of being the fifth largest net importer of hazardous waste, managing nearly a quarter of a *billion* pounds of other states' hazardous waste per year. *Id.*

Contrary to the impression created by the Brief for the United States as *Amicus Curiae* at 5, there are only *20* operational RCRA-permitted commercial landfill facilities for hazardous waste, *nationwide*, located in 15 states. *See* Testimony of P. Payne, president of Chemical Waste Management, before the National Governors' Association Committee on Energy and Environment, February 2, 1992, *reported in* BNA Daily Environment Report, February 4, 1992, at A-6 to A-7. Over the last 10 years, only one new commercial landfill facility has been permitted and become operational for hazardous waste. *See supra*, p. 3 & n.6. Because only 15 states possess any commercial landfill capacity for hazardous wastes, most of the nation has exported, and continues to export, hazardous waste for landfilling in other states.[18] The fate

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[17] *NGA Capacity Assurance Study*, *supra* n.10, at 11-14 (partially quoted, *supra*, p. 12 n.13).

[18] Alabama's effort to regulate the flow of hazardous waste into the Emelle facility is entirely consonant with Congressional goals of decreased reliance on landfill disposal:

> The Congress finds with respect to the environment and health, that—

of Alabama, South Carolina, and their companion states reflects the irony of a failed regulatory regime: *solely* be cause these states had sited landfill capacity for hazardous wastes *prior* to implementation of the RCRA regulations, they are being asked by Petitioner and others to bear the brunt of the entire hazardous waste landfill disposal burden on a long-term basis.

The capacity-assurance requirement of CERCLA § 104 (c) (9) has afforded no relief to South Carolina and Alabama, contrary to Congress's intent. Congress expected that this CERCLA mandate would remedy the inequities posed by certain states' unwillingness to confront the NIMBY syndrome. In addressing the Conference Report of the CERCLA amendments to the Senate on October 3, 1986, Senator Chafee was explicit:

> This is not a new issue. In 1976, RCRA directed the States to develop plans for the management of *their* wastes, including hazardous wastes. . . .
>
> Section 104 of Superfund already requires that each State assure the availability of a RCRA-approved facility for management of materials removed from a site before remedial action can begin. Unfortunately, that condition has been largely ignored by EPA and the States.

. . .

(7) certain classes of land disposal facilities are not capable of assuring long-term containment of certain hazardous wastes, and to avoid substantial risk to human health and the environment, reliance on land disposal should be minimized or eliminated, and land disposal, particularly landfill and surface impoundment, should be the least favored method for managing hazardous wastes; and

(8) alternatives to existing methods of land disposal must be developed since many of the cities in the United States will be running out of suitable solid waste disposal sites within five years unless immediate action is taken.

RCRA § 1002(b) (7) and (8), 42 U.S.C. § 6901(b) (7) and (8).

> Many states have enacted, or have pending some form of siting legislation. . . . Merely having enacted such legislation, however, will not satisfy the requirement of this section [104(c) (9)]. Each State must provide assurances that their legislative program can work and will be used.
>
> 132 Cong. Rec. S14,924-25 (daily ed. Oct. 3, 1986) (emphasis added).

By requiring in Section 104(c) (9) that each state assure that it will have adequate capacity to dispose of hazardous waste generated *in that state*, additional facilities with new capacity would be sited notwithstanding the NIMBY syndrome. *Id.*[19]

Unfortunately, enactment of CERCLA § 104(c) (9) and implementation of the capacity-assurance requirement has not produced the desired result. EPA has fail-

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[19] Congress understood that importing states could refuse the exporting state access to its facilities for purposes of meeting the Section 104(c) (9) requirement. To qualify for Superfund assistance, the exporting state would have the incentive to create new capacity. EPA anticipated and endorsed this approach in CERCLA guidance to the states:

> Congress required exporting states to provide assurances and to obtain interstate agreements, because political pressures encourage states to export their wastes to other states rather than to create available capacity . . . . By requiring (as a condition for remedial actions) agreements between states regarding future access to available interstate capacity, Congress counterbalanced these political pressures in exporting states with the political pressures in importing states that might oppose continued receipt of such exports. *An importing state might refuse to enter into an agreement with an exporting state, requiring the exporting state to create available capacity through waste reduction or through siting new facilities, or to enter into an agreement with other importing state to manage these wastes.*

Assurance of Hazardous Waste Capacity: Guidance to State Officials, OSWER Directive No. 9471.00-01, at 3 (formerly No. 9010.00 (Dec. 1988) (emphasis added), supplemented by OSWER Directive No. 9471.00-02 (formerly 9010.00a (Oct. 1989)) and OSWER Directive No. 9471.00-01a (Apr. 15, 1991).

ed to use its powers under CERCLA or RCRA to require that states permit additional disposal capacity. Indeed, if the Agency's position articulated in this and other recent litigation were to be accepted, it would lead to the stunning conclusion that states may effectively ban all hazardous waste disposal in-state for "NIMBY" reasons; such an effective ban would mandate reliance on exports to South Carolina, Alabama, and other states with existing, pre-RCRA capacity. *See Hazardous Waste Treatment Council v. Reilly*, 938 F.2d 1390 (D.C. Cir. 1991). On the other hand, the Agency's litigation positions correlatively would bar states like South Carolina, which have permitted facilities, from implementing their capacity-assurance plans, even though South Carolina has expressly reserved more capacity for disposal of out-of-state waste than for locally-generated waste at these permitted facilities. *See Hazardous Waste Treatment Council v. South Carolina*, 945 F.2d 781 (4th Cir. 1991). Surely this posture on the part of EPA is neither what Congress provided in enacting RCRA §§ 3006 and 3009 and CERCLA § 104(c)(9), nor what the "dormant" Commerce Clause commands.

B. Measured By A "Dormant" Commerce Clause Analysis Or Statutory Criteria, Alabama's Differential Fee Is Tailored To Serve A Legitimate Public Purpose

The analytical framework for this case is in dispute. The Alabama Supreme Court applied a "dormant" Commerce Clause test derived from *Maine v. Taylor*, 477 U.S. 131 (1986), focusing on whether a state statute "serves legitimate local purposes that could not adequately be served by available non-discriminatory alternatives." Appendix to Petition, at 43a, citing *Maine v. Taylor*, 477 U.S. at 151-52. The briefs of Petitioner and supporting *amici* emphasize and urge an analysis based upon the "strictest scrutiny" of economic protectionist measures. This case is not about economic protection, however. Alabama is not seeking to "protect" its hazardous waste landfill industry. And, as the brief for the United States as *amicus curiae* points out, this case arises in a setting shaped almost entirely by the federal regulatory regime established by RCRA and CERCLA. Federal law plays such a large role that this should not be a "dormant" Commerce Clause case at all. *See infra*, p. 23.

In all events, strikingly absent from the briefs of the Petitioner and supporting *amici*, including that of the United States, is any reference to or recognition of the central role played by the states in the regulation of hazardous wastes. While RCRA provides a very detailed federal regulatory scheme, Congress did not displace state authority. It rather provided for integration of state authority within the federal framework, which provides a regulatory floor for state action. The prominent role given to state authority must be afforded significant weight in any Commerce Clause analysis.

Congress has expressly provided that "the collection and disposal of solid wastes should continue to be primarily the function of State, regional and local agencies." RCRA § 1002(a)(4), 42 U.S.C. § 6901(a)(4). Section 3006(b) of RCRA provides that authorized state hazardous waste management programs operate "in lieu of the Federal program." 42 U.S.C. § 6926(b), Appendix *infra*, at 1a. In addition, RCRA § 3009 preserves state authority against preemption by federal regulatory requirements where the state provisions are not "less stringent than those authorized under [RCRA §§ 3001-3026] respecting the same matter." *Id.* § 6929, Appendix *infra*, at 2a.

Congress went further, moreover, and in RCRA § 3009, it preserved for the states the authority to regulate hazardous waste with provisions "which are more stringent than those imposed by" federal law. *Id.* (captioned "Retention of State Authority"). The House Report of the bill that became RCRA identified this section as "the key to the development and implementation of the hazardous waste title." H.R. Rep. No. 1491, 94th

Cong., 2d Sess., at 31, *reprinted in* 1976 U.S. Code Cong. & Admin. News 6238, 6269. In that regard, the House Committee Report observed that "federal preemption of this problem is undesirable, inefficient, and damaging to local initiative." *Id.* at 33, 1976 U.S. Code. Cong. & Admin. News at 6271. In testimony before Congress preceding RCRA's enactment, EPA endorsed RCRA's "emphasis on State primacy in terms of hazardous waste regulatory program operations. We also believe that strong State regulatory programs are the most effective way to assure appropriate management of hazardous wastes."[20]

EPA has construed Sections 3006 and 3009 to provide congressional authorization for the states to differentiate in their treatment of in-state versus out-of-state waste, and did so specifically when considering South Carolina's differential fee under 40 C.F.R. § 271.4(a):

> More stringent requirements are expressly permitted by RCRA Section 3009. These requirements may have some adverse effect on interstate commerce. Different requirements are permissible if they are not inconsistent with the Federal program and approved State programs. Authorized States have adopted many State requirements that are unlike the requirements of other States and which, in some cases, have an effect on the flow of wastes. The Agency does not believe that the mere existence of differences or disparities in treatment makes State programs inconsistent *per se. Congress expected that States would not have identical programs and recognized the importance of allowing States to experiment with different requirements.* Congress gave EPA the authority to interpret the term "consistent"; the Agency has interpreted the term in § 271.4 to prevent *unreasonable* restrictions or impediments in authorized programs.

50 *Fed. Reg.* at 46,439, Appendix *infra*, at 11a-12a (emphasis added).

EPA's analysis of differential fees in the South Carolina program-approval proceeding has two consequences for this case. First, it shows that the "reasonableness" test adopted by EPA in 40 C.F.R. § 271.4(a), and not "dormant" Commerce Clause jurisprudence, should control. *Compare Northeast Bancorp, Inc. v. Board of Governors*, 472 U.S. 159, 174 (1985); *White v. Massachusetts Council of Constr. Employers, Inc.*, 460 U.S. 204, 213 (1983); *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408, 421-27 (1946); *with Wyoming v. Oklahoma*, —U.S. —, 112 S. Ct. 789, 802 (1992); *South-Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 90-91 (1984); *New England Power Co. v. New Hampshire*, 455 U.S. 331, 340-43 (1982).[21] But regardless of whether § 271.4(a)

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[20] *Resource Recovery and Conservation Act of 1976: Hearings on H.R. 14496 Before the Subcomm. on Transportation and Commerce of the Committee on Interstate and Foreign Commerce*, 94th Cong., 2d Sess. 97-98 (1976) (Statement of Sheldon Meyers, Deputy Assistant Administrator for Solid Waste Management Programs, Environmental Protection Agency).

[21] The Alabama differential fee was adopted after EPA granted final approval to the Alabama hazardous waste program, but that does not derogate from the validity of the provision under RCRA or subject it to "dormant" Commerce Clause scrutiny rather than 40 C.F.R. § 271.4(a). The federal-state RCRA alliance is a dynamic venture; an approved state program is not static. Changes to an authorized program do not require express EPA authorization to become effective, and all statutory or regulatory modifications or supplements to the program operate "in lieu of the Federal program," 42 U.S.C. § 6926(b), Appendix *infra*, at 1a, unless and until EPA authorization is withdrawn through administrative procedures. *Id.* § 6926(e); 40 C.F.R. §§ 271.22-.23. No such proceedings were initiated by CWM prior to raising its challenge in the Alabama state courts. If CWM had raised its claims before EPA, an ensuing decision by EPA would have been reviewable in a federal court of appeals. RCRA § 7006(b), 42 U.S.C. § 6976(b). Petitioner's choice of forum should not alter the controlling law.

Particularly where EPA has already addressed the validity of a differential fee in light of RCRA §§ 3006(b) and 3009 and of EPA's own regulations, as it has in the case of South Carolina's, Maine's,

is thought to be controlling, EPA's analysis of RCRA Sections 3006(b) and 3009 evidences that states may differentiate between in-state waste and out-of-state waste. Therefore, petitioner's and supporting *amici's* contention that the Alabama fee is unconstitutional simply because it "discriminates" between in-state and out-of-state waste is wrong. Dogmatic and repetitive references to language from *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978), are quite beside the point given the circumstances pertinent to this case.

The second implication evident from EPA's analysis in the South Carolina program-approval proceeding is that hazardous waste, or, more properly, hazardous waste landfill capacity, as an article of commerce operates in a milieu governed by detailed regulation. This circumstance is by congressional design:

- Congress authorized states to regulate hazardous waste more stringently than federal law does, explicitly to serve environmental purposes. RCRA § 3009, 42 U.S.C. § 6929, Appendix *infra*, at 2a.
- Congress declared that "reliance on land disposal should be minimized or eliminated, and land disposal, *particularly landfill* [such as at Petitioner's Emelle facility] and surface impoundment, *should be the least favored method for managing hazardous wastes*" because such facilities "are not capable of assuring long-term containment of certain hazardous wastes, and to avoid substantial risk to human wealth and the environment." RCRA § 1002(b)(7), 42 U.S.C. § 6901(b)(7) (emphasis added).
- Congress understood that the failure to site and permit new disposal facilities is not a market failure but a regulatory result of the NIMBY syndrome, and Congress's remedy was not to unleash market forces but to require each state to assure adequate capacity for disposal of *its* waste, which it must do by demonstrating the availability of facilities that are "*within the State or* outside the State *in accordance with an interstate agreement or regional agreement* or authority." CERCLA § 104(c)(9)(B), 42 U.S.C. § 9604(c)(9)(B) (emphasis added).

The issue in this case thus is *not* whether the Alabama statute will interfere with the market or lead to "Balkanization." In this particular area, fundamental market principles were long ago bent far from their normal shape by regulation. From the perspective of Alabama and South Carolina, the Balkanization which has occurred relates to burdens and has been escalated by EPA's tacit acceptance of the NIMBY syndrome. The issue is whether Alabama has acted reasonably under the circumstances (40 C.F.R. § 271.4(a)), or whether, as elucidated in *Maine v. Taylor*, 477 U.S. 131 (1986), the State's action is "justified by a valid factor unrelated to economic protectionism." *New Energy Co. of Indiana v. Limbach*, 486 U.S. 269, 274 (1987) (citing *Maine v. Taylor*).

The Alabama Supreme Court demonstrated articulately that the fee differential can withstand the elevated scru-

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and Ohio's differential fees, that prior construction is entitled to great weight. "[T]he court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation." *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837, 843 (1984) (footnotes omitted).

The *amicus* brief filed by the United States on behalf of EPA may not revise or alter EPA's interpretation expressed in regulations and policy decisions. "Congress has delegated to the administrative official and not to appellate counsel the responsibility for elaborating and enforcing statutory commands." *Investment Co. Inst. v. Camp*, 401 U.S. 617, 628 (1971). EPA itself has noted that its Office of General Counsel and other "entities within EPA do not appear to share a common focus regarding the RCRA program's goals and priorities," as a result of which "the regions and states . . . pay the price for this lack of integration." EPA Office of Solid Waste & Emergency Response, *The Nation's Hazardous Waste Management Program at a Crossroads—The RCRA Implementation Study*, at 16-17 (July 1990).

tiny of the test set out in *Maine v. Taylor*. The environmental concerns motivating the legislation are substantial. Given the failure of the existing regulatory regime to site new post-RCRA landfill capacity for hazardous wastes, and the failure of the CERCLA capacity-assurance program to work a change in this situation, waste imports can and do impose disparate burdens on states which have existing landfill capacity. *See, e.g., National Solid Wastes Management Association v. Voinovich*, No. 91-3466 (6th Cir. March 4, 1992) (1992 U.S. App. LEXIS 3500). Moreover, the State has "a legitimate interest in guarding against imperfectly understood environmental risks, despite the possibility that they may prove ultimately to be negligible." *Maine v. Taylor*, 477 U.S. at 148.[22]

Landfilling of hazardous waste at the Emelle facility in Alabama poses a serious threat, one which extends well beyond the eventual closure of that facility. RCRA has failed the State; CERCLA has failed the State; EPA has failed the State. Under federal law, it is manifestly appropriate for Alabama to exercise its authority under federal statute to regulate the treatment, storage, and disposal of hazardous waste within its borders. Alabama's differential fee on hazardous waste represents a measured exercise of the state's traditional police powers, narrowly crafted to recompense special burdens Alabama bears for hazardous waste landfill disposal at minimal cost to the national economic union. Whether measured by 40 C.F.R. § 271.4(a) or *Maine v. Taylor*, the fee differential should be sustained.

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[22] In this instance, the risks are all too real, even though they may be difficult to quantify. What is the cost, for example, of stranding thousands of motorists in a huge traffic jam caused by the spontaneous combustion of a truckload of hazardous waste? *See supra*, pp. 9-10 n.11.

CONCLUSION

For the reasons set forth above, and those set forth in the Brief for the Respondents, the judgment of the Alabama Supreme Court should be affirmed.

Respectfully submitted,

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April 9, 1992

APPENDIX

APPENDIX

RCRA Section 3006(b), 42 U.S.C. § 6026(b):

§ 6926. Authorized State hazardous waste programs

* * * *

(b) Authorization of State program

Any State which seeks to administer and enforce a hazardous waste program pursuant to this subchapter may develop and, after notice and opportunity for public hearing, submit to the Administrator an application, in such form as he shall require, for authorization of such program. Within ninety days following submission of an application under this subsection, the Administrator shall issue a notice as to whether or not he expects such program to be authorized, and within ninety days following such notice (and after opportunity for public hearing) he shall publish his findings as to whether or not the conditions listed in items (1), (2), and (3) below have been met. Such State is authorized to carry out such program in lieu of the Federal program under this subchapter in such State and to issue and enforce permits for the storage, treatment, or disposal of hazardous waste (and to enforce permits deemed to have been issued under section 6935(d)(1)[13] of this title) unless, within ninety days following submission of the application the Administrator notifies such State that such program may not be authorized and, within ninety days following such notice and after opportunity for public hearing, he finds that (1) such State program is not equivalent to the Federal program under this subchapter, (2) such program is not consistent with the Federal or State programs applicable in other States, or (3) such program does not provide adequate enforcement of compliance with the requirements of this subchapter.

In authorizing a State program, the Administrator may base his findings on the Federal program in effect one year prior to submission of a State's application or in effect on January 26, 1983, whichever is later.

RCRA Section 3009, 42 U.S.C. § 6929:

§ 6929. Retention of State authority

Upon the effective date of regulations under this subchapter no State or political subdivision may impose any requirements less stringent than those authorized under this subchapter respecting the same matter as governed by such regulations, except that if application of a regulation with respect to any matter under this subchapter is postponed or enjoined by the action of any court, no State or political subdivision shall be prohibited from acting with respect to the same aspect of such matter until such time as such regulation takes effect. Nothing in this chapter shall be construed to prohibit any State or political subdivision thereof from imposing any requirements, including those for site selection, which are more stringent than those imposed by such regulations. Nothing in this chapter (or an any regulation adopted under this chapter) shall be construed to prohibit any State from requiring that the State be provided with a copy of each manifest used in connection with hazardous waste which is generated within that State or transported to a treatment, storage, or disposal facility within that State.

40 C.F.R. § 271.4:

§ 271.4 Consistency.

To obtain approval, a State program must be consistent with the Federal program and State programs applicable in other States and in particular must comply with the provisions below. For purposes of

this section the phrase "State programs applicable in other States" refers only to those State hazardous waste programs which have received final authorization under this part.

(a) Any aspect of the State program which unreasonably restricts, impedes, or operates as a ban on the free movement across the State border of hazardous wastes from or to other States for treatment, storage, or disposal at facilities authorized to operate under the Federal or an approved State program shall be deemed inconsistent.

(b) Any aspect of State law or of the State program which has no basis in human health or environmental protection and which acts as a prohibition on the treatment, storage or disposal of hazardous waste in the State may be deemed inconsistent.

(c) If the State manifest system does not meet the requirements of this part, the State program shall be deemed inconsistent.

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Friday, November 8, 1985

Rules and Regulations

[46437]

40 CFR Part 271

[OSW-FRL-2921-6]

South Carolina; Decision on Final Authorization of State Hazardous Waste Management Program

AGENCY: Environmental Protection Agency.

ACTION: Notice of Final Determination on South Carolina's Application for Final Authorization.

SUMMARY: South Carolina has applied for Final Authorization under the Resource Conservation and Recovery Act (RCRA). EPA has reviewed South Carolina's application and has reached a final determination that South Carolina's Hazardous Waste Program satisfies all of the requirements necessary for Final Authorization. Thus, EPA is granting Final Authorization to the State to operate its program in lieu of the Federal program.

EFFECTIVE DATE: Final Authorization for South Carolina, for purposes of judicial review, shall be effective at 1:00 p.m. Eastern time on November 22, 1985. However, in accordance with § 271.20(e), this Notice constitutes the Agency's official decision to approve South Carolina for Final Authorization.

FOR FURTHER INFORMATION CONTACT: Otis Johnson Jr., Chief, Waste Planning Section, Residuals Management Branch, Waste Management Division, U.S. Environmental Protection Agency, 345 Courtland Street N.E., Atlanta, Georgia 30365, (404) 257-3016.

SUPPLEMENTARY INFORMATION:

I. Background

Section 3006 of the Resource Conservation and Recovery Act (RCRA) allows the Environmental Protection Agency (EPA) to authorize State hazardous waste management programs to operate in the State in lieu of the Federal program. To qualify for Final Authorization, a State's program must: (1) Be "equivalent" to the Federal program, (2) be consistent with the Federal program and other State programs, and (3) provide for adequate enforcement (Section 3006(b) of RCRA, 42 U.S.C. 6226(b) [sic]). On July 23, 1984, South Carolina submtted a complete application to obtain Final Authorization to administer a RCRA program. On October 25, 1984, EPA published a tentative decision announcing its intent to grant South Carolina Final Authorization. Further background on the tentative decision appears at 49 FR 42959, October 25, 1984.

In the October 25 notice announcing the Agency's tentative determination, EPA announced the availability of the State's application for public review and comment and the date of a public hearing on the application. The public hearing was not held, since neither EPA nor the South Carolina Department of Health and Environmental Control received a significant show of interest in holding the hearing.

On March 5, 1985, the decision to grant final authorization to South Carolina was temporarily postponed. At that time, EPA decided to defer a final decision until July 1985 to allow the State a reasonable period of time to resolve identified issues.

Prior to EPA's review of the State's performance in July 1985, the South Carolina Hazardous Waste Management Act (1935 Act No. 436) was amended to establish increased fees for disposal of hazardous waste. The amendments passed in June 1985 changed section 44-56-

170 to raise the fee for land disposal of wastes generated within the State from $5.00 to $13.00 per ton. For land disposal of wastes generated outside the State, the fee was raised from $7.50 per ton to either $18.00 per ton or to the amount that would be charged for land disposal by the State in which the wastes were generated, whichever is higher.

[46438] EPA determined that this statutory change constituted a substantial program revision, and in accordance with 40 CFR 271.20(b), the Agency decided to solicit public comment. On September 13, 1985 (50 FR 37385), EPA published a second notice of tentative determination to approve the State. In that notice, EPA highlighted the question of whether the South Carolina Hazardous Waste Management Act Amendments rendered the State program inconsistent with the Federal program or approved State programs under RCRA.

The question to be settled before EPA granted final authorization was whether the South Carolina fee schedule rendered the State program inconsistent with the Federal program and other State programs. Under § 271.4(a) a State treatment, storage or disposal at facilities authorized to operate under the Federal or an approved State program . . .". [sic]

In the notice of tentative determination, EPA stated that while higher fees for out-of-State wastes should not be encouraged, the Agency did not have any evidence to indicate that the new fees would unreasonably restrict, impede, or operate as a ban on the transportation of hazardous waste into the State. The only evidence before the Agency at that time were South Carolina's statements that the fee imposed constitutes a "relatively small percentage" of the actual cost of disposal and that, in the State's view, it would not unreasonably restrict or impede the movement of hazardous waste (50 FR 37386, September 13, 1985). The Agency solicited comment on whether the State law unreasonably restricts, impedes or

operates as a ban on the importation of hazardous waste, under the consistency requirements of 40 CFR 271.4(a). EPA received written comments and also held a public hearing in Columbia, South Carolina.

II. Basis for EPA's Decision to Grant Final Authorization

The Agency today is making a final determination that the South Carolina fee schedule does not impose an unreasonable impediment or restriction or operate as a ban on the free movement of hazardous waste under 40 CFR 271.4. The fee schedule is not inconsistent with the Federal program or approved State programs under this regulation or under RCRA. This section explains the reasons for the Agency's decision on this matter. Because this was the only outstanding issue, the Agency is now able to grant final authorization to the State.

A. EPA's regulation

EPA adopted the present regulation at 40 CFR 271.4(a) on May 19, 1980 (see 45 FR 33395, 33465-66, May 19, 1980). The regulation states that any aspect which "unreasonably restricts, impedes or operates as a ban" is deemed inconsistent.

In the preamble discussing § 271.4(a), EPA explained the regulation as follows. The Agency stated that any aspect of the program which operates as a ban on the interstate movement of hazardous waste is automatically inconsistent. The Agency noted that this position was supported by a court decision, *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978), which held unconstitutional a statute banning transportation of certain wastes into the State for disposal because it violated the commerce clause of the Constitution. (This discussion is consistent with that in the preamble to the proposed regulation (44 FR 34259, June 14, 1979).)

EPA did not discuss what criteria it would apply in determining whether State programs unreasonably restrict or impede the free movement of hazardous waste. However, it is clear from the regulation that EPA intended "unreasonable restrictions or impediments" to render State programs inconsistent. The question of whether a State provision unreasonably restricts or impedes the free movement of hazardous waste did not arise in any final decision to grant RCRA final authorization until South Carolina's amended statute raised this issue.

B. The Agency's Tentative Decision on South Carolina Authorization

As noted above, EPA tentatively concluded that the South Carolina statute did not render the State program inconsistent under 40 CFR 271.4(a). In reaching this conclusion, the Agency considered all available facts. It appeared reasonably clear from the face of the statute that the fee schedule was not a ban and that it did not operate as a ban. The evidence before the Agency did not indicate that the fee schedule had significantly affected the flow of hazardous waste into the State. However, because the amended statute was a potentially significant change to the State program which might affect authorization under 40 CFR 271.4, the Agency solicited comment on whether the fee schedule unreasonably restricts or impedes the flow of hazardous waste into South Carolina.

C. Public Comment

Public comment, with one exception, supported EPA authorization of the State program. Several commenters did not address the question of the fee schedules but generally stated that South Carolina's RCRA program was supported by adequate legal authority and staffing and therefore deserved authorization. The only land disposal facility in South Carolina known to the Agency to accept out-of-State hazardous waste and to pay the fees at issue also generally supported authorization, but did not address the question rasied [sic] by the fee schedule.

Several other commenters who favored authorization argued that the fee schedule was reasonable and justified. They provided a variety of rationales including that the higher fees were appropriate: (1) To discourage land disposal as it is enviornmentally [sic] the least desireable [sic] form of disposal, (2) to raise money that might be expended to address released [sic] from land disposal units, (3) to discourage land disposal and thereby conserve the State's limited land disposal resources, and (4) to supplement State funds for monitoring compliance at land disposal facilities accepting out-of-State wastes.

The State of South Carolina commented that the one land disposal facility in South Carolina which accepts out-of-State wastes charges $90.00 per ton for disposal. First, the State noted that the new fee differential of $5.00 per ton for out-of-State wastes represents but a small percentage of this charge. The State believed that this small amount would not discourage out-of-State generators from using the facility. Second, the State noted that during the period of July to September of 1984 there were 16,848 tons of out-of-State waste disposed at the facility. During the same period in 1985, when the new fee schedule was in place, there were 26,352 tons of out-of-State waste disposed. The State cited this increase as factual proof that the fee schedule has not had any adverse impact on the amount of waste imported into the State. The State reported that fees had been collected at both the $18.00 rate and at higher rates corresponding to the fees of the States from which the wastes were shipped. Third, the State noted that a fee differential, including rates equivalent to those charged in the shipping State, had existed for several years and that there has been a continuing increase in the volume of wastes imported into the State.

The Hazardous Waste Treatment Council was alone in opposing authorization for South Carolina. The Council did not dispute that the volume of imported waste had in-

creased despite the higher fees. Rather, they believed [16439] that the fee schedule discriminates on its face against interstate commerce and therefore was an unconstitutional and unreasonable restriction on the free flow of waste. The Council argued that: (1) The disparity in fees rendered the program "inconsistent" under RCRA 3006(b) as it did not promote the essential uniformity among hazardous waste programs intended by Congress, (2) the disparity in favor of in-State wastes was unconstitutional and therefore was inconsistent under RCRA 3006(b) and an unreasonable restriction or impediment under § 271.4(a), and (3) discriminatory statutes will frustrate RCRA objectives for a national market for development of proper treatment and dispsoal [sic] practices.

The Council stated that in promulgating 40 CFR 271.4, EPA had adopted a constitutional test to determine what is an unreasonable restriction and impediment. Therefore, they argued that the unconstitutional statute violated § 271.4(a). They also argued that it would be too difficult to assess whether there is in fact a significant discrimination on a case-by-case basis.

EPA believes that these are the substantive comments relating to the fee schedule and the Agency's decision. These and other comments are addressed in this notice and in a separate comment and response document that is available from EPA Region IV (address listed at the front of this notice).

D. Application of § 271.4(a) to South Carolina's Fee Schedule

EPA carefully evaluated the above comments in determining whether the South Carolina fee schedule was an unreasonable restriction or impediment to the free movement of hazardous waste.

The Agency has determined that in applying § 271.4 (a) to State laws and regulations, EPA should look to

whether the State provision in fact has or is likely to have a significant adverse effect on the follow [sic] of hazardous waste into or out of the State. Thus, the unreasonableness of the restriction or impediment under § 271.4(a) should be measured by the impact of [sic] likely impact on the actual flow of waste. In applying this test, EPA will look to all relevant factors. The Agency will primarily focus on any available evidence on the quantities of wastes that are imported and exported.

The Agency believes that this test is a reasonable interpretation of its regulation and does not conflict with section 3006 of RCRA. Section 271.4(a) does not by its terms prohibit any restrictions or impediments, only those that are unreasonable. Reasonable restrictions or impediments can logically include those that do not significantly decrease the flow of hazardous waste. Therefore, EPA does not agree that *any* disparity in treatment between in-State and out-of-State wastes is *per se* unreasonable. Contray to the statement by the Hazardous Waste Treatment Council, the preamble adopting this regulation did not state that EPA was relying on the Constitutional test for impremissible [sic] restraints on interstate commerce as the basis for finding restrictions or impediments unreasonable. The Agency is not required to adopt the Constitutional test for impediments or restrictions in interpreting its own regulations, and declines to do so here.

EPA also believes that its interpretation of the regulation accords with RCRA. RCRA section 2006 [sic] requires EPA to approve State programs unless it finds they are; [sic] (1) Not equivalent, (2) not consistent, or (3) lacking adequate enforcement authority. To be equivalent, States must adopt a set of basic statutes and regulations that are equivalent to EPA's. In addition, States may adopt requirements which are more stringent or different than EPA's authority. More strin-

gent requirements are expressly permitted by RCRA section 3009. These requirements may have some adverse effect on interstate commerce. Different requirements are permissible if they are not inconsistent with the Federal program and approved State programs. Authorized States have adopted many State requirements that are unlike the requirements of other States and which, in some cases, have an effect on the flow of wastes. The Agency does not believe that the mere existence of differences or disparities in treatment makes State programs inconsistent *per se*. Congress expected that States would not have identical programs and recognized the importance of allowing States to experiment with different requirements. Congress gave EPA the authority to interpret the term "consistent"; the Agency has interpreted the term in § 271.4 to prevent unreasonable restrictions or impediments in authorized programs. Nothing in RCRA section 3006(b) or any other section of RCRA requires the Agency to adopt the Constitutional test as the test for consistency or unreasonable restrictions or impediments.

The Agency does not believe that higher fees for out-of-State wastes or other discriminatory practices should be encouraged. EPA is concerned that such fees may discourage wastes from going to the most appropriate facility for treatment or disposal.

However, it appears that South Carolina's fee schedule does not have a significant adverse effect on the flow of hazardous waste into or out of the State. All available evidence supports this conclusion. The fact that the fee differential is small in most cases indicates that the out-of-State fee probably will not restrict a significant volume of waste. Moreover, the fact that the volume of out-of-State wastes increased significantly after the higher fees were imposed suggests that there is not a significant adverse impact on the flow of wastes. The fees clearly do not operate as a ban in this case. In addition, some fees

were collected at the higher rate based on the fees of other States. Finally, the volume of wastes imported into the State has increased over the years despite a fee differential which included fees based on those in the State of origin. Although it is unknown how much more waste might have entered South Carolina if there were no fee differential, there is no information to suggest that a significant volume might be affected. The Agency disagrees that this test (which looks to the facts of each case) is too difficult to apply.

Several comments related to the reasons for the State's adoption of the fee schedule and one addressed the concern that discriminatory practices would frustrate RCRA objectives for a national market for proper treatment and disposal practices. EPA acknowledges that the State offered several reasons for the fee differential. However, the Agency believes that the reasons for the adoption of the fee or any purported benefits are not generally relevant to the question of reasonableness of the impediment or restriction. If a provision has little or no impact on the flow wastes, EPA does not believe that the actual motives or benefits resulting from the provision should preclude authorization. EPA is also concerned that different provisions for in-State and out-of-State wastes may frustrate the best possible treatment and disposal of wastes. As noted above, RCRA intended that State programs be generally uniform for purposes of encouraging proper treatment and disposal and EPA has interpreted this consistency requirement to deny authorization where restrictions or impediments are unreasonable. It does not require EPA to deny authorization merely because in-State and out-of-State wastes are regulated somewhat differently by the State. In any event, there is no evidence that proper [46440] treatment or disposal is adversely affected by this statute; the volume of wastes into South Carolina has increased.

In applying this facts and circumstances test, EPA is aware that circumstances may change over time. The

Agency will therefore periodically reassess provisions which may unreasonably impede the flow of wastes, including this fee schedule of South Carolina. In addition, any provisions adopted by States seeking authorization and which impose or result in restrictions or impediments on the flow of wastes will be subjected to careful scrutiny. If an authorized State adopts restrictions or impediments that may affect the flow of hazardous wastes, EPA may find that such changes are significant revisions to the States' program and provide public notice and comment under § 271.21 on their potential impacts on interstate transportation of wastes. If the restrictions or impediments are found to be unreasonable, they would be grounds for withdrawal of the authorized program under § 271.22.

For the reasons discussed above, EPA has concluded that South Carolina's fee schedule is not an unreasonable impediment or restriction on the flow of waste into the State and that authorization is not precluded by § 271.4 (a). Nevertheless, the Commissioner of the South Carolina Department of Health and Environmental Control has informed the Agency that he will recommend to the South Carolina Legislature that it repeal that aspect of the fee schedule which imposes higher fees based on rates charged by the State of origin. EPA supports this effort.

South Carolina is not authorized by the Federal government to operate the RCRA program on Indian lands and ths [sic] authority will remain with EPA.

Final authorization is hereby granted to South Carolina to operate its hazardous waste management program in lieu of the Federal program subject to the limitation on its authority by the Hazardous and Solid Waste Amendments of 1984 (Pub.L. 98-616, November 8, 1984). South Carolina now has the responsibility for permitting treatment, storage, and disposal facilities within its borders and carrying out the other aspects of the RCRA program. South Carolina also has primary enforcement

authority, although EPA retains the right to conduct inspections and make information requests under section 3007 of RCRA and to take enforcement action under sections 3008, 3013, and 7003 of RCRA.

Prior to the Hazardous and Solid Waste Amendments (HSWA) amending RCRA, a State with final authorization administered its hazardous waste program entirely in lieu of EPA. EPA's regulations no longer applied in the authorized State, and EPA could not issue permits for any facilities the State was authorized to permit.

Now, however, under section 3006(g) of RCRA, 42 U.S.C. 6226(g), the new Federal requirements and prohibitions imposed by the HSWA take effect in authorized States at the same time as they take effect in non-authorized States. EPA is directed to carry out those requirements and prohibitions, including the issuance of full or partial permits, in authorized States until the State is granted authorization to do so.

As a result of HSWA, there will be a dual State-Federal regulatory program in South Carolina. To the extent the authorized State program is unaffected by the HSWA, the State program will operate in lieu of the Federal program. EPA will administer and enforce the portions of the HSWA in South Carolina until the State receives authorization to do so. Among other things, this will entail the issuance of Federal RCRA permits for those areas in which the State is not yet authorized. Once the State is authorized to implement a HSWA requirement or prohibition, the State program in that area will operate in lieu of the Federal program. Until that time the State will assist EPA's implementation of the HSWA under a Cooperative Agreement.

Federal HSWA requirements that are more stringent than the State's program apply in South Carolina. Any State requirement that is more stringent than a Federal HSWA provision also remains in effect. (South Carolina

is not being authorized now for any requirement implementing the HSWA.)

EPA has published a Federal Register notice that explains in detail the HSWA and its effect on authorized States. Refer to 50 FR 2872-28755, [sic] July 15, 1985.

Compliance With Executive Order 12291

The Office of Management and Budget has exempted this rule from the requirements of section 3 of Executive Order 12291.

Certification Under the Regulatory Fexibility Act

Pursuant to the provisions of 5 U.S.C. 605(b), I hereby certify that this authorization will not have a significant economic impact on a substantial number of entities. This authorization effectively suspends the applicability of certain Federal regulations in favor of South Carolina's program, thereby eliminating duplicative requirements for handlers of hazardous waste in the State. It does not impose any new burdens on small entities. This rule, therefore, does not require a regulatory flexibility analysis.

List of Subjects in 40 CFR Part 271

Hazardous waste, Indian lands, Reporting and recordkeeping requirements, Waste treatment and disposal, Intergovernmental relations, Penalties, Confidential business information.

Authority: This notice is issued under the authority of sections 2002(a), 3006, and 7004(b) of the Soid [sic] Waste Disposal Act as amended 42 U.S.C. 6912(a), 6926, 6974(b), and EPA Delegation 8-7.

Dated: November 5, 1985

Jack E. Ravan,

Regional Administrator.

[FR Doc. 85-26814 Filed 11-7-85; 8:45 am]

[SEAL]

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
Washington, D.C. 20460
Dec. 23, 1988

THE ADMINISTRATOR

MEMORANDUM

SUBJECT: Policy Regarding Hazardous Waste Management Capacity and RCRA Consistency Issues

TO: Regional Administrators

In recent months we have focused on two parallel, but overlapping, issues in the hazardous waste management area. One issue has been the development of guidance for the State hazardous waste capacity assurance process called for by Section 104(c)(9) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). The other has been the issue of EPA's approach to State actions which may be inconsistent with the federal Resource Conservation and Recovery Act program.

This past June a task force on these RCRA consistency and CERCLA capacity issues presented their findings to me. In addition, we have now completed our guidance to the States for the CERCLA capacity assurance process. Based on an evaluation of the findings and guidance, I now want to present to you EPA's policy in the area of RCRA consistency and CERCLA capacity assurance.

First, we will rely on the CERCLA process as our primary vehicle for ensuring that States have adequate capacity to manage their hazardous wastes. As our CERCLA capacity guidance indicates, the States must provide EPA with a good knowledge of their current and projected waste amounts and management practices, including correlation of imports and exports between States; description of waste minimization programs; and

discussions of laws and regulations which may affect the state's ability to manage wastes. EPA must approve these State assurances in order for EPA to provide Superfund remedial actions in a State after October 17, 1989.

Secondly, the Regions should use the procedures for withdrawal of authorized State RCRA programs in the case of failure to use the RCRA uniform manifest system, or for unreasonable restrictions on interstate waste movements. The CERCLA capacity assurance process should be used as an initial response to State actions which prohibit waste management within State boundaries without environmental justification. States may be able to resolve issues related to such actions themselves during the interstate discussions that the CERCLA process will foster. The Regions should, therefore, decide whether to initiate proceedings to withdraw State RCRA programs for prohibitory actions after determining that the CERCLA process has proven ineffective.

I believe the above dual approach to be a positive one allowing us to work within the legal authority provided, and to assist States in developing needed waste management capacity.

/s/ Lee M. Thomas
LEE M. THOMAS